Office - Supreme Court, U.S.
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MAR 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1268

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON, PETITIONER

v.

ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Cherokee Tobacco, The, 78 U.S. (11 Wall.) 616 3

Choate v. *Trapp*, 224 U.S. 665 5

Choteau v. *Burnet*, 283 U.S. 691 ..... 3, 5

Donovan v. *Navajo Forest Products Industries*, 692 F.2d 709 5-6

White Oklahoma Apache Tribe v. *Bracker*, 448 U.S. 136 6

Treaty and statutes:

Treaty with Indians in Middle Oregon, June 25, 1855, 12 Stat. 963 5

Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):

Section 4041 ..... 1, 2
Section 4041(a) 3
Section 4041(b) 3
Section 4041(b)(2) 1
Section 4041(g) 2, 3
Section 4061 3
Section 4061(a) 2
Section 4061(a)(1) 1, 2
Section 4218(a) 2
Section 4221(a)(4) 2, 3
Section 4221(d)(4) 4
Section 4481 .....
Section 4481(a) 1, 2, 3
Section 4483(a) 2, 4

Page

Treaty and statutes—Continued:

Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 5

Periodic Payment Settlement Act of 1982, Pub. L. No. 97-473, 96 Stat. 2605 4

Section 202(a), 96 Stat. 2608 4

Section 204, 96 Stat. 2611 4

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Petitioner seeks review of the decision below holding that it was not exempt, during the periods at issue, from federal excise taxes because of its status as a confederation of Indian tribes.

The pertinent facts may be summarized as follows: Petitioner is a confederation of Indian tribes occupying the Warm Springs Indian Reservation in Oregon and it owns and operates a sawmill situated on that reservation (Pet. App. A-19). In connection with the operation of that sawmill, petitioner owns and operates several "highway motor vehicles" as defined in Section 4481(a) of the Internal Revenue Code of 1954 (26 U.S.C. (Supp. V)), and uses "diesel fuel" within the meaning of Section 4041 of the Code. Petitioner also uses certain special motor fuels within the scope of Section 4041(b)(2). In addition, in 1974,

petitioner acquired a truck "glider" kit (cab, frame, and front axle), which it assembled into a truck chassis within the scope of Section 4061(a)(1) (Pet. App. A-19 to A-20).

After paying excise taxes with respect to the use of its "highway motor vehicles" pursuant to Section 4481(a) for several periods, petitioner sought to recover the amounts paid on the theory that it was exempt from federal excise taxes. Following the denial of its refund claim, petitioner instituted this suit for refund in the United States District Court for the District of Oregon.[1] In response, the government counterclaimed for additional federal excise taxes on the use of diesel fuel and special motor fuels under Section 4041 of the 1954 Code, and for manufacturer's excise tax under Sections 4061(a) and 4218(a) of the 1954 Code with respect to petitioner's assembly of the aforementioned truck chassis (Pet. App. A-20).

Petitioner claimed that it is exempt from liability for these excise taxes on the grounds (1) that it is a governmental entity within the scope of the exemption provisions of Sections 4041(g), 4221(a)(4) and 4483(a) of the 1954 Code, and (2) that no treaty provision expressly authorizes the imposition of these excise taxes. Petitioner also argued that the imposition of the taxes was inconsistent with the special relationship it has with the federal government, which ultimately manages its economic activities (Pet. App. A-20 to A-21). The district court granted summary judgment in favor of the government on the ground that no exemption, express or implied, exists to relieve petitioner of liability for these taxes (Pet. App. A-14 to A-16).

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[1] In addition to seeking a refund of the taxes paid, petitioner's complaint sought injunctive relief restraining the government from assessing and collecting such taxes.

The court of appeals affirmed. It held that the pertinent provisions of the Internal Revenue Code unambiguously exempt only states, their political subdivisions, and the District of Columbia from the federal excise taxes at issue here, and that none of these provisions encompass Indian tribes. The court also held that no implied exemption existed under any treaty between the government and the tribes in question or because of any federal regulatory scheme regarding the exploitation of their resources (Pet. App. A-18 to A-35).

1. The decision below correctly held that petitioner was not exempt from federal excise taxes. It is well established that, absent an express exemption, a general federal taxing statute reaches all persons and entities within the scope of its terms, including Indians and Indian tribes. *E.g., Choteau* v. *Burnet*, 283 U.S. 691, 696-697 (1931). See also *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870).[2] It is undisputed that, by their terms, the taxing provisions of Sections 4041(a) and (b), 4061(a)(1), 4218(a) and 4481(a) of the Internal Revenue Code of 1954 apply to the activities in question. Moreover, no statutory exemption provision expressly encompasses the petitioner with respect to any of these activities.

An exemption from the diesel fuel and special motor fuels excise tax is provided by Section 4041(g) of the 1954 Code in the case of sales of such fuels to, or use by, "any State, any political subdivision of a State, or the District of Columbia." A similar exemption from the manufacturer's excise tax under Section 4061 is provided by Section 4221(a)(4)

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[2]As the Court has indicated in numerous cases, Congress may, of course, prohibit the states from imposing such taxes.

with respect to articles that are sold to (and for the exclusive use of) a "State or local government." Section 4221(d)(4) defines the term "State or local government" for this purpose as meaning "any State, any political subdivision thereof, or the District of Columbia." Finally, Section 4483(a) exempts "any State or any political subdivision of a State" from the excise tax on the use of "highway motor vehicles." None of these provisions, however, encompasses Indian tribes by its terms. As the court below noted (Pet. App. A-22 to A-24), while such tribes may be characterized as "governmental entities" in certain respects, they simply do not fall within the terms of any of these exemption provisions since they are themselves neither "states" nor "political subdivisions" of any state.[3]

2. The court of appeals also correctly held (Pet. App. A-29) that an implied exemption does not exist by virtue of the fact that no treaty provision between the United States and the tribes in question expressly provides for the imposition of excise taxes on their activities. While it is true that ambiguities in a treaty are generally construed in favor of

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[3]On January 14, 1983, the President signed into law the Periodic Payment Settlement Act of 1982, Pub. L. No. 97-473, 96 Stat. 2605. Section 202(a) of that Act (96 Stat. 2608) adds a new provision (Section 7871) to the Internal Revenue Code of 1954, under which Indian tribal governments are to be treated as states (and certain tribal subdivisions may be treated as political subdivisions of a state) for purposes, *inter alia*, of the excise tax exemption provisions here in issue. This provision, however, does not operate retroactively. Rather, under Section 204 of the Act (96 Stat. 2611), it became effective, for excise tax purposes, on January 1, 1983, and shall cease to apply, for such purposes, after December 31, 1984. Accordingly, the enactment of this provision does not aid petitioner with respect to the pre-1983 excise taxes at issue in this case.

Indian tribes or entities comparable to petitioner's, *e.g.*, *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912), that rule is not relevant here. The treaty[4] between the government and petitioner contains no ambiguity regarding the taxation of petitioner, but is simply silent on this matter. Petitioner's assertion (Pet. 22-23) that the treaty's silence on the question of federal taxation serves to exempt petitioner from the taxes in question is diametrically opposed to the established rule that "[t]he intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter." See *Choteau* v. *Burnet*, *supra*, 283 U.S. at 696.

Contrary to petitioner's further argument (Pet. 26-27), the decision below does not conflict with *Donovan* v. *Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982). There, the court found a conflict between the Occupational Safety and Health Act of 1970 (OSHA), Pub. L. No. 91-596, 84 Stat. 1590, and a treaty between the government and the Navajo tribe. The Tenth Circuit, applying the general rule that ambiguities in Indian treaties are to be resolved in the favor of Indians, held that the application of OSHA to Navajo Forest Products Industries would abrogate a treaty provision which permitted, *inter alia*, the tribe to exclude all persons (except certain authorized government agents) from entering onto their land and which recognized the sovereignty of the Navajos and their right of self-government. In its view, requiring the Navajo Forest Products Industries to submit to inspection under and comply with OSHA would limit those rights. 692 F.2d at 711-712. Here, however, as the court of appeals determined, the treaty between the United States and petitioner granted

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[4]Treaty with Indians in Middle Oregon, June 25, 1855, 12 Stat. 963.

petitioner no immunity from federal taxation. There is accordingly no conflict between the treaty and the excise tax provisions of the Internal Revenue Code.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1983

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[5]Petitioner's reliance (Pet. 23-24) on *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), is similarly misplaced. There, the Court held that the federal regulatory scheme pertaining to the operation of a sawmill on the White Mountain Apache Reservation was so pervasive as to preclude the State of Arizona from imposing *its* excise taxes in connection with the operation of that business. However, nothing in that decision would suggest that the existence of a pervasive scheme of federal regulation would also preclude the federal government itself from imposing such "additional burdens" on the operation of a tribal enterprise. Nor is the principle of tribal sovereignty relevant here. Indian tribes retain a measure of their aboriginal independence vis-a-vis the states, but they are fully subject to the plenary power of Congress.

DOJ-1983-03